Nos. 985, 986.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

THE KANSAS CITY STAR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

EMIL A. SEES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

The Government brief in opposition to the petitions for certiorari herein fully confirms the contention of the main petitions—and the worst fears of the newspapers of this country.

The Government squarely takes the position that newspapers are not "reasonably interchangeable" with other mass media and that, when charged with monopolization, newspapers are properly prohibited even from submitting proof of the competitive onslaughts of other mass media.

Inescapably, under the Government theory, every newspaper which is the only newspaper in its town has monopoly power and exists at the sufferance of the Attorney General. This fearful power is too great a weapon to place in the hands of any administration. We do not believe that this Court is prepared to permit any such result.

Even the Government shows understandable reluctance to state this proposition baldly. It seeks to blur the issue with four contentions:

1. Although petitioners' market evidence was excluded even from consideration by the jury, the Government argues that the District Court somehow "left to the jury" the decision on the question of the appropriate market.

2. The Government seeks to pass off this case as just another "predatory acts" case although, concededly, the charge of the District Court permitted the jury to convict even if it found in petitioners' favor on every act and incident alleged by the Government.

3. The Government omits any reference to the major areas of its case which were totally unproved, including the charge of monopolization of news and the vital issue of the absence of any vestige of market control over radio and television.

4. Finally, the Government is driven to contend that, even if the Star was erroneously convicted of monopolization, review should still be denied it because of the verdict on attempted monopolization—which concededly merged in the offense of monopolization and on which no sentence was imposed and no judgment entered and from which no appeal could have been taken.

The District Court ruled on the appropriate market as a matter of law, excluding from the jury's consideration the great bulk of petitioners' evidence.

Inexplicably, the Government states the first question presented as whether the District Court "properly left it to the jury to decide" the relevant market (Gov't Br. p. 2).

The simple and inescapable fact is that that is exactly what the District Court did not do; instead, it deliberately and systematically excluded petitioners' evidence on this point.

The jury was not permitted to pass on the appropriate market, either product-wise or geographically.* Similarly, petitioners' evidence of the mobility of demand between the competing mass media was systematically excluded by the court (DX 78-82; R. 3079-87, R. 2221-32).

Under these circumstances, with most of petitioners' market evidence never before the jury, it is utterly futile for the Government to claim that the jury concluded that the Star was not "reasonably interchangeable" with other media. (See Gov't Br. p. 21)

The District Court's exclusion of this evidence was particularly prejudicial in view of its mis-definition of the crime of monopolization. The District Court's charge watered down beyond recognition the definition of that offense by equating "monopoly" with "dominance" and "dominance" with being "the biggest" and by instructing the jury that monopoly power consists of the power to secure a "competitive advantage" or to impose a "handicap" (R. 2444-45, 2446, 2447, 2453-57).

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* National magazines excluded (DX 83-90; R. 3089-3101; R. 1870-71, 2231-46, 2272); certain radio stations excluded (R. 2105-06, 2114-20, 2130-34, 2137, 2142, 2145, 2151-52, 2154-56, 2332-33); outdoor advertising excluded (R. 2364-66); certain daily and weekly papers excluded (DX 44, 45, R. 2911-27; R. 1883-85); geographical market evidence excluded (R. 1883-85, 2110, 2120-23, 2165-66).

One final point should not be overlooked. The Government purports to view with surprise what it terms the "Star's contention" that the conviction herein rests on a finding that "dominance" in the daily newspaper field is the equivalent of monopoly power. (Gov't Br. pp. 5-6.)

Such purported surprise ill becomes the Government, which tried this case and opposed the appeal to the Eighth Circuit on precisely that ground. As merely one example, in its brief to the Eighth Circuit the Government listed as one of the major pillars of its case:

> "Evidence as to the overwhelmingly dominant position of the Star in the daily newspaper field in Metropolitan Kansas City, *a dominance which supplied the Star with the power to monopolize;*" (emphasis supplied) Gov't Br. to the Eighth Circuit, p. 64.

Even in its present brief in opposition, the Government, as it has at every stage of this litigation, lays great stress on the Star's "dominant position" and its supposed "indispensability" to certain local advertisers. *These contentions are equally applicable to every newspaper which is the only newspaper in its town—92% of the newspapers in this country.*

The individual acts and incidents were not adjudicated adversely to petitioners. Such acts are irrelevant to the questions presented on this appeal.

In an apparent attempt to divert attention from the crucial legal issues presented by this petition, the Government devotes almost half its brief to a belaboring of individual acts and incidents which have nothing to do with this petition.

The Government writes its brief as though the jury had found petitioners guilty of every individual act as to which the Government introduced evidence in the course of a trial which consumed over 3,000 pages of printed record. The Government so argues although the incidents were sharply controverted and the jury may have decided in petitioners' favor on any—and, indeed, on all.

Under the charge, the jury could have convicted even if it fully absolved petitioners of any of the controverted incidents charged by the Government since

1. The jury was permitted to convict even if it found that petitioners' claimed power was wholly unexercised and

2. The jury was permitted to convict on the basis of the existence of the unit advertising rate or the unit subscription rate, in and of themselves, without regard to any other evidence in the case.

Where, as here, the trial judge offers the jury a variety of grounds on which it can convict, it is not enough to show that evidence exists to support some particular ground on which the jury conceivably could have gone. If any one of the alternatives offered in this case by the District Court in its confused and confusing charge was incorrect or misleading, then petitioners' conviction must be reversed.

The question is not what a judge might have decided had he been sitting as the trier of fact. The question is whether the jury was so charged by the judge that it could have convicted on grounds which are erroneous as a matter of law.

Thus, if the trial court wrongly determined the market or improperly defined the crime of monopolization, the convictions cannot stand, regardless of the existence or nonexistence of particular incidents.

The erroneous judgment of monopolization is not saved by the verdict with respect to attempted monopolization.

In apparent recognition of the vulnerability of the conviction for monopolization, the Government argues strenuously that, even if that conviction were erroneous, it nonetheless should be permitted to stand because the Star was also charged with an attempt to monopolize and the jury found against petitioner on that count.

The Government slurs over the fact that, as the District Court held, the attempt count merged into the monopolization count, that no sentence was entered on the attempt count, and that no appeal could thereafter have been taken on that count.*

On this point the record is so clear that it is difficult to fathom the Government's argument. For example, in ruling upon petitioners' motion to set aside the verdict, the District Court held:

> "It is my own conclusion that defendant cannot be penalized for both the attempt to monopolize, and of monopolization, although each is made a separate offense by the act. * * *
>
> "It is my conclusion, as it has been the conclusion of other courts under similar circumstances, that the offense of attempting to monopolize merged in the greater offense of monopolization, and permits but a single penalty. American Tobacco Co. *vs.* U. S., 328 U. S. 781**; U. S. *vs.* Shapiro, 103 F. 2d 775." (R. 326-27.)

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* The Government cites in support two cases where concurrent sentences were given on separate and independent counts, any one of which sufficed to uphold the sentence. Neither case in any way involved merger and neither has the remotest relevance to the question here presented.

** In *Tobacco*, as here, no appeal was prosecuted from the attempted monopolization count.

At sentencing, the District Court further reinforced its prior ruling by stating:

> "I am going to impose the *maximum* penalty upon the Star. It is not a large sum of money but I am going to impose the maximum penalty. The defendant Star will be fined the sum of $5,000.00.
>
> "The defendant Sees, whatever acts he committed were committed for and on behalf of The Star. If The Star can only be fined $5,000.00, and that of course is the *maximum,* I cannot feel that the defendant Sees should be fined an amount equal to The Star." (emphasis supplied) (R. 2517.)

Patently, if the "maximum penalty" (then $5,000 for each violation) was imposed upon the Star, sentence was imposed only upon the monopolization count (Count II). There having been no sentence imposed upon the attempted monopolization count (Count I), no final judgment was entered on that count and, accordingly, there was nothing from which the Star could have prosecuted an appeal. See *Berman* v. *United States,* 302 U. S. 211, 212 (1937); Rule 37(a)(2), Fed. Rules Crim. Proc.

If the Government is really serious in urging that an erroneous conviction should be upheld on appeal because of the existence of a merged, non-appealable conviction, this question alone would seem sufficiently important to the administration of criminal law to require review by this Court.

The fact that the Government is plainly in error on the procedural point should not be permitted to obscure the further fact that the Star's conviction of attempted monopolization was equally erroneous and was vitiated by the same errors which vitiate the conviction for monopolization. Whether the offense charged is attempted or consummated monopolization, the defendant has the unqualified

right to show the existence of effective competition, and denial of this right is equally reversible error in either instance.

The District Court permitted the jury to convict on the existence of the unit advertising rate or the unit subscription rate alone without reference to any other evidence in the case.

The Government states the question presented as to the unit advertising rate and the unit subscription rate as whether "under all the circumstances shown by the record" the jury would have been justified in convicting on the basis of either of these two practices (Gov't Br. p. 2).

This statement is quite misleading. The District Court's charge on this point (see Gov't Br. p. 25) makes obvious that the jury was given two clear alternatives with respect to each of the unit rates. It was permitted to convict:

> —either on the basis of the evidence relating to the unit rate alone
>
> —or, alternatively, on the basis of the evidence relating to the unit rate "in conjunction with all other evidence" (R. 2456-57).

By completely ignoring the first half of this charge, the Government's entire discussion of the issue relating to the unit rates utterly begs the question. The first portion of the charge permitted the jury, without looking at a single fact in the case other than the unit advertising rate or the unit subscription rate, to convict petitioner of monopolization. In so doing, it constituted reversible error.

The District Court so charged in the absence of any evidence that either unit rate had been adopted or maintained for any monopolistic purpose, and in the face of overwhelming evidence that the adoption and maintenance of both

unit rates were entirely motivated by legitimate business purposes.

On the further question whether the Star constituted one or two papers, the Government brief, if anything, points up the irreconcilability of the decision below with *Times-Picayune.*[*]

This case presents for the first time the question whether a single trader can be convicted for unexerted monopoly power.

The Government unqualifiedly takes the position that the decisions of this Court in *Griffith* and *Tobacco* (holding that a conspiracy to monopolize violates Section 2 of the

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[*] Thus, at page 7, n. 3, the Government purports to prove its case by stating that the issues published by the Star "had different mastheads and carried different news, editorials, comics, syndicated columns, etc." The finding of the lower court in *Times-Picayune*, reversed as a matter of law by this Court, was virtually verbatim: that the Times-Picayune and States had "an entirely different and distinctive make-up and appearance" and contained "different features, syndicated columns, editorial cartoons, comics, and news." *United States* v. *Times-Picayune Publishing Co.*, 105 F. Supp. 670, 673 (E. D. La. 1952).

The Government also relies on the fact that the Audit Bureau of Circulation listed the Star's two issues as different papers. But in *Times-Picayune, the defendant itself* submitted to the ABC "separate statements for the Times-Picayune, morning and Sunday, and the States, evening". *Ibid.*

The further argument of the Government that *Times-Picayune* is inapplicable because certain of the Star's "advertisers had distinct preferences for one Star paper or the other" (Gov't Br. p. 25, n.) ignores the fact that in *Times-Picayune* "a number of classified advertisers" and "a great number" of general advertisers expressed similar preferences. 105 F. Supp. at 674-75, 676.

The Government also wholly misconceives the *Newhouse* case (Gov't Br. p. 24, n.). There, the court followed *Times-Picayune* in rejecting application of the rationale of the tying cases in determining the legality of unit advertising rates, holding that such practice by the publisher of the only morning and evening newspaper issues in the city did not violate Section 2. It further held that the legality of the practice under Section 1 must be measured with reference to the general prohibitions of that section, not by the rationale of the tying cases. 236 F. 2d at 525-26.

Sherman Act even though the monopoly power remains unexerted) are equally applicable to sole traders. It does so despite the fact that, in *Tobacco,* this Court specifically limited its ruling to conspiracy cases, stating:

> "It is therefore only in conjunction with . . . a combination or conspiracy that these cases will constitute a precedent." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 798 (1946).

The Star is the first sole trader ever convicted under a charge permitting conviction for unexerted monopoly power. If that is the law, it represents a change in the antitrust laws of major magnitude. If that is not the law, the bar and bench of this country should be so advised and this conviction must be reversed.

The Government seeks to expand vastly the scope of the crime of attempted monopolization by diluting it to a mere "likelihood".

With respect to Sees' petition, the Government, in two pages, lightly dismisses the new definition of the crime of attempted monopolization contained in the charge of the District Court by contending that the phrase "dangerous probability" of monopolization means substantially the same to the average person as the phrase "likely to accomplish monopolization". Gov't Brief, pp. 28-29. Here, too, a change of far-reaching implications is being smuggled into the antitrust laws with blithe assurances that nothing really is happening.

If a defendant may properly be convicted where a mere likelihood of monopolization exists, the scope of the crime of attempted monopolization is stretched beyond any concept contained in prior cases and loses all touch with the law of attempt in every other area of criminal law.

Petitioner Sees was denied a fair trial.

To the substantial showing in petitioner Sees' petition of the fatal prejudice to him of a joint trial (Sees' Petition, pp. 7-9, 18-21), the Government gives the "short answer" that the fact that the jury convicted him on only one count while convicting the Star on two is somehow proof that he received a fair trial (Gov't Br. p. 30).

It is obvious that the jury's verdict may be evidence of nothing more than complete confusion on the part of the jury. The same argument now advanced by the Government—that a jury verdict differing as to different defendants was proof of the jury's separate consideration of each defendant—was rejected by this Court in *Kotteakos* v. *United States,* 328 U. S. 750 (1946).

Rather than carefully admonishing the jury as to the evidence applicable to Sees, as the Government suggests (Gov't Br. p. 30), the District Court actually thrust upon the jury the function of ruling on the admissibility of the evidence by permitting the jury to determine whether or not the evidence was connected with Sees. *In at least 135 instances* the District Court sustained Sees' objections "unless connected up" and the jurors were consequently unable to differentiate as to the evidence admissible solely as to Sees during the lengthy and complex trial of this case (Sees Petition, pp. 7-8, 19).

To compound this error, the District Court in its final instructions erroneously submitted against Sees all the charges and all the evidence with one single exception, even though only a small portion thereof could be applicable to Sees (Sees Petition, pp. 19-21). If the jury followed the District Court's instructions, Sees was subject to conviction on the basis of virtually any and every act referred to in the court's charge (except the unit subscription rate prac-

tice), even though he had nothing to do with most of the charges. This was clearly reversible error.

The Government makes virtually no attempt to defend the further fatal error in Sees' conviction—the basing of guilt not upon personal conduct, but upon the civil doctrine of imputed liability. Gov't Br. p. 31, n. For example, the District Court instructed that Sees could be convicted on the basis of the unit advertising rate alone (R. 2452-56), although Sees did not establish and could not alter this practice.

Further, Sees had no connection with or supervision over news gathering or dissemination or any aspects of radio or television; he was concerned solely with newspaper advertising (R. 2267-69). Yet he was convicted of attempting to monopolize the dissemination of news and advertising through newspapers, radio and television—a conviction made possible only by the failure of the courts below to require proof of the essential elements of the offense and by imputing to Sees criminal liability for the acts of others.

This is not a mere factual ruling, as the Government suggests (Gov't Br. p. 31 n.), but a matter of first importance in the administration of federal criminal law in protracted antitrust trials. The formulation and application of standards of procedure and evidence in trials of this type is essential, especially where the liberty and the reputation of individuals are involved.

Conclusion.

The decision below presents a serious and immediate threat to the independence of the press of this country—a threat which is made more real by the position frankly espoused by the Government in its brief.

The decision below is irreconcilable with the *Cellophane* and *Times-Picayune* decisions and charts—badly and erroneously—broad new areas of antitrust laws that have never before been explored.

It is respectfully submitted that the national interest in an independent and unintimidated press and the necessity of resolution of crucial questions of antitrust law of sweeping applicability both require that the petitions for writs of certiorari should be granted.

Respectfully submitted,

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